TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~352.~~ 122

THE EASTERN KENTUCKY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 31, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 352.

THE EASTERN KENTUCKY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return of circuit court thereon	2	1
Declaration and bill of particulars	4	2
Statement of agreed facts	5	2
Judgment	9	4
Opinion of court	10	4
Certificate of clerk	12	4
Copy bond on writ of error	13	5

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Eastern Kentucky Railway Company, a corporation established under the laws of the State of Kentucky, having its usual place of business in Boston, in the district of Massachusetts, plaintiff, and Charles W. Slack, of said Boston, collector of the internal revenue of the United States for the third collection district of Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

JOHN LOWELL,
District Judge.

Sufficient service of this writ of error, and of a citation thereunder, is hereby acknowledged.

GEORGE P. SANGER,
U. S. Att'y for Def't in Error.

2 Circuit court of the United States, district of Massachusetts, *ss:*

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1876.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and

and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Before the honorable Nathan Clifford, associate justice.

THE EASTERN KENTUCKY RAILWAY COMPANY, a corporation established under the laws of the State of Kentucky, having its usual place of business in Boston, in the district of Massachusetts, plaintiff,

v.

CHARLES W. SLACK, OF SAID BOSTON, COLLECTOR of United States internal revenue, third collection district of Massachusetts, defendant.

In an action of contract.

And the plaintiffs say the defendant owes them thirteen hundred and nine $\frac{36}{100}$ dollars (1,309$\frac{36}{100}$), according to the account annexed.

BILL OF PARTICULARS.

Charles W. Slack, esquire, collector U. S. internal revenue, 3d collection district of Massachusetts, to the Eastern Kentucky Railway, Co., Dr.

(1)	To amount of internal-revenue taxes on coupons erroneously and illegally assessed and collected July 31, 1874	$239 25
(2)	" int. on same to June 17, '73	27
(3)	" am't taxes as above collected May 29, 1872	981 29
(4)	" int. on same to June 17, '73	61 82
		1,309 36

The writ in this cause is dated the seventeenth day of June, A. D. 1873, and is made returnable before the justices of the superior court of the commonwealth of Massachusetts then next to be holden at Boston,
5 within and for the county of Suffolk, on the first Tuesday of July, A. D. 1873. This cause was removed from said superior court to this circuit court by writ of certiorari dated the ninth day of July, A. D. 1873, and made returnable before this circuit court on the fifteenth day of October, A. D. 1873. This cause was duly entered here at the May term of this court, A. D. 1873, and was thence continued to the October term of this court, A. D. 1873, when due return was made of said writ of certiorari, and the parties appeared by their respective attorneys. This cause was thence continued from term to term to the October term A. D. 1875, when, on the tenth day of February, A. D. 1876, the following statement of agreed facts was filed, namely:

Suit to recover tax alleged to have been erroneously and illegally assessed upon and collected from the plaintiff company, to wit:

Taxes on coupons of Kentucky Improvement Co.:

Coupons due	Feb. 15, '71, tax paid	93 75
"	" Aug. 15, '71, " "	375
"	" Feb. 15, '72, " " for 4½	281 25
Ass. to Jan. 1, '72, or Dec. 31, '71		750

The circumstances under which the bonds bearing the coupons,
6 the tax on which is in controversy, were issued, are fully shown

in the statement of facts filed in the case of the Kentucky Improvement Co. vs. Slack, collector, &c., argued January 24, 1876, to which reference is hereby made. The plaintiff company was duly organized under an act of the general assembly of the commonwealth of Kentucky, approved January 18, 1870, which provided as follows:

"S. 1. Be it enacted that Nathaniel Thayer * * * , or any five of them who may act, are hereby appointed commissioners, and they, their associates and successors, are created a body politic and corporate for the purpose of constructing a railway with a single or double track, &c., &c., &c.

"S. 2. The name and style of the corporation hereby created shall be 'the Eastern Kentucky Railway Company'; said company through its board of directors shall have and may exercise all the powers, and shall have all the privileges and rights usual and incident to such corporations.

"S. 7. The said company shall have power to purchase, acquire,
7 and hold any line of railway, finished or unfinished, lying on or near its line, or crossing the same, or between its termini, with all the chartered privileges held or properly exercised by the company from such railway may be bought or acquired, and all the property, real and personal, right of way, &c., of such company, and may make payment for any railway and other property so bought or acquired, on such terms and conditions as may be agreed between the parties."

Other provisions of the charter recognized the right of the company to engage in the general business of common carriers upon their line or lines of railway. By deed, dated February 28, 1870, the Kentucky Improvement Company conveyed to the plaintiff company "all the property of the party of the first part (i. e., the Kentucky Improvement Company) real, personal, and mixed, including its franchise, subject, however, to a certain mortgage made by the party of the first part, bearing date August 15, 1866, to Nathaniel Thayer and others, of the landed property and improvements of said party of the first part at that date, in trust
to secure a certain issue of bonds bearing even date therewith, to
8 the extent of $500,000, as therein more particularly set forth, and which mortgage is still in force so far as the same is applicable to and covers the property proposed to be hereby conveyed," that is to say, the issue of bonds having the coupons, the tax on which is in controversy. Taxes upon the coupons above described were assessed upon and collected from the plaintiff company. Appeal was duly made to the Commissioner of Internal Revenue, April 29, 1873, and he notified the company of the rejection of the claim by letter, dated May 27, '73. The taxes were paid at the following dates:

1871, July 31	$93 75
1872, May 29	375
	281 25

F. W. PALFREY,
For Pl'ff.
GEORGE P. SANGER,
U. S. Att'y for Def't.

JAN. 31, '76.

This cause thereupon came on to be heard by the court, the honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court by the
9 honorable George F. Shepley, circuit judge, sitting and holding said court, and was fully argued by the counsel for the respective

parties. This cause was thence continued to this present term, when, on the twenty-first day of July, A. D. 1876, the opinion of the honorable Daniel Clark, district judge as aforesaid, that the defendant is entitled to judgment for his costs, is filed, and thereupon, to wit, July 21, A. D. 1876, it is considered by the court, the honorable John Lowell, district judge, sitting, that the said Eastern Kentucky Railway Company take nothing by its said writ, and that the said Charles W. Slack, defendant, recover of the said Eastern Kentucky Railway Company, plaintiffs, his costs of suit, taxed at dollars and cents.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

10 The following is a copy of the opinion of the court, in accordance with which judgment was entered for the defendant July 21, A. D. 1876, namely:

Circuit court of the United States, district of Massachusetts.

EASTERN KENTUCKY RAILWAY COMPANY, plaintiff,
v.
CHARLES W. SLACK, DEFENDANT.

Opinion of the court.

JULY 21, A. D. 1876.

CLARK, J.:

In the case of the Kentucky Improvement Co. against C. W. Slack, I held that the plaintiff co. was a railroad company and liable to the tax assessed upon the coupons of the bonds issued for building its road, & secured by a mortgage of its property and improvements, for reasons there stated.

11 The Eastern Kentucky Railway Co., in pursuance of authority in its charter, purchased "all the property" of the Kentucky Improvement Co., "real, personal, and mixed, including its franchise, subject, however, to a certain mortgage made" by said Kentucky Improvement Co., August 15th, 1866, to secure a certain issue of bonds of said Improvement Co. to the amount of $500,000.

The statute of July 14th, 1870 (16 St. at Large, sec. 15, p. 260), provided "that there shall be levied and collected for and during the year eighteen hundred and seventy-one a tax of two and a half per centum on the amount of all interest or coupons paid in bonds," &c., and payable in one or more years, &c., by any of the corporations mentioned in the section, among which were railroads.

The Eastern Kentucky Railway Co. having purchased the property of the Kentucky Improvement Co., including its railroad, subject to the mortgage, to secure the bonds and coupons in question, the inference is, were to pay said bonds and coupons and were liable to the tax assessed.

Judgment for def't and for his costs.

12 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record (including the opinion of court) and of all proceedings in the cause of The Eastern Kentucky Railway Company v. Charles W. Slack, in said court determined.

In witness whereof I have hereunto set my hand and affixed the seal

of said circuit court, at Boston, in said district, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] JOHN G. STETSON, *Clerk.*

13 Know all men by these presents, that we, The Eastern Kentucky Railway Company, a corporation established under the laws of the State of Kentucky, having its usual place of business in Boston, in the district of Massachusetts, as principals, and Nathaniel Thayer and John Thomas, both of said Boston, as sureties, are held and firmly bound unto Charles W. Slack, of said Boston, collector of the internal revenue of the United States for the third collection district of Massachusetts, in the full and just sum of three hundred dollars, to be paid to the said Charles W. Slack, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Eastern Kentucky Railroad Company, plaintiff, and said Charles W. Slack, defendant, judgment was rendered against the said plaintiff; and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said defendant citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876:

Now the condition of the above obligation is such, that if the said plaintiff shall prosecute its said writ of error to effect, and answer all damages and costs if he fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue

EASTERN KENTUCKY RAILWAY CO.,
By R. SULLIVAN, *Treasurer.* [L. S.]
N. THAYER. [L. S.]
JOHN THOMAS, [L. S.]

Associate Jus. Sup. Court of the U. S.

Signed, sealed, and delivered in presence of—

Approved:

JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 352. The Eastern Kentucky Railway Company, plaintiff in error, vs. Charles W. Slack, collector of internal revenue. Massachusetts C. C. U. S. Filed 31st March, 1877.

Supreme Court of the United States.

— No. 122. —

THE

EASTERN KENTUCKY RAILWAY CO.

Plaintiff in Error,

VS.

CHARLES W. SLACK,

COLLECTOR OF INTERNAL REVENUE.

In Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE PLAINTIFF IN ERROR.

BOSTON:

PRINTED BY T. W. RIPLEY, 138 CONGRESS STREET.

1879.

Supreme Court of the United States.

No. 122.

The Eastern Kentucky Railway Company, Plaintiff in Error,

vs.

Charles W. Slack, Collector of Internal Revenue.

BRIEF FOR THE PLAINTIFF IN ERROR.

The Kentucky Improvement Company, a corporation established under the laws of the State of Kentucky, made, on or about the 15th day of August, 1866, an issue of bonds to the amount of $500,000, and secured the same by a mortgage of their then landed property and improvements, which did not include a railroad.

The Eastern Kentucky Railway Company was organized under an Act of the General Assembly of the Commonwealth of Kentucky, approved January 18, 1870, of which Act the seventh section was as follows: "The said Company shall have power to purchase, acquire, and holdany line of railway, finished or unfinished, lying on or near its line, or crossing the same, or between its termini, with all the chartered privileges held or properly exercised by the Company from which such railway may be bought or acquired, and all the property, real and personal, right of way, &c., of such company, and may make payment for any railway and other property so bought or acquired, on such terms and conditions as may be agreed between the parties."

By deed dated February 28, 1870, the Kentucky Improvement Company conveyed to the plaintiff company "all the property of the party of the first part (*i. e.* the Kentucky Improvement Company), real, personal, and mixed, including its franchise, subject, however, to a certain mortgage . . ." to wit, the mortgage above-named.

It is conceded that the plaintiff was legally and in fact a railroad company in the common sense of the words, and that the deed aforesaid conveyed to it the line of railway of the Kentucky Improvement Company, which railway had been built since the execution of the mortgage aforesaid and before the execution of the deed aforesaid.

The circumstances under which were issued the bonds bearing the coupons the tax on which is in controversy, are fully shown in the Record in the case of the Kentucky Improvement Company *vs.* Slack, Collector, &c., No. 123, and in the argument in that case it has been attempted to show that the coupons in question were not taxable under the Internal Revenue Act of July 13, 1866, XIV St. 138. Certain taxes (Record, p. 2) upon the coupons attached to the bonds above referred to were assessed, and were collected from the plaintiff in error. Appeal was duly made to the Commissioner of Internal Revenue, and the claim rejected. Suit was thereupon brought, and judgment therein for the defendant below (the defendant in error here) was rendered, in the Circuit Court of the United States for the District of Massachusetts, and the case comes here on writ of error to said Circuit Court.

The question involved is the right of the Government to impose the tax in question upon the coupons aforesaid.

The error assigned is that the Court below erred in finding —

1. That the Kentucky Improvement Company was a railroad company, and liable to the tax assessed upon the coupons on its bonds.

2. That the Eastern Kentucky Railway Company, having purchased the property of the Kentucky Improvement Company, including its railroad, subject to the mortgage above-mentioned, were liable to the tax assessed.

It is not proposed to repeat in this case the argument made for the plaintiff in error in the case of the Kentucky Improvement Company *vs.* Slack, Collector. If that argument shall have failed to satisfy the Court, the plaintiff here is unable to suggest any ground upon which it should be held entitled to recover.

But if that argument shall have satisfied the Court that the Kentucky Improvement Company was not a railroad Company indebted, &c., within the language of the Act, then we submit that the plaintiff in this case is entitled to judgment.

The Act under which the assessment in question was laid, viz., the Act of July 14, 1870 (XVI St. 260), is substantially like the Act of

July 13, 1866, except that it reduced the coupon tax from five per cent. to two and a half.

This tax was not a tax on the corporation issuing bonds, but on the income of the bondholder, as has been frequently decided by this Court. It was collected through the medium not of all corporations, but only of certain specified corporations. It was collected from the holders of bonds of other than such corporations, — telegraph and mining companies, for instance, — directly, as a part of their income tax. If, therefore, the holders of the bonds bearing the coupons the tax on which is in controversy here, are held to be the holders of bonds not of a railroad company but of a mining company, their income tax (if any be due) is to be collected from them directly, and not through the medium of a railroad company which, without any act of theirs, and by a transaction to which they are total strangers, has become the owner of property mortgaged to secure their debt.

Suppose the Kentucky Improvement Company's deed had been, not to a railroad company, but to an individual or firm, the question raised in this case would not have arisen, and we submit that the holders of bonds of the Kentucky Improvement Company were no more liable to Internal Revenue taxation on their coupons (provided the Kentucky Improvement Company was not a railroad company indebted, &c.), through the medium of the purchasing corporation, after the sale, than they were before. They were all entitled (XIV St. 478) to exemption from tax to the amount of $1000 of their income, and the way to do justice, and no more than justice, was to collect no tax from the corporation, and to take from each bondholder what was due from him.

It is not easy to see how a man of small income, wholly derived from investments in railway bonds, was to get justice under the Internal Revenue laws. Let us suppose that his nominal income was just $1000, and all derived from coupons on railway bonds. The railway company would pay him (under the last Act taxing coupons) $975. The law allowed him $1000 income free of tax. If he derived just that amount of income from the rent of real estate, for example, he enjoyed that amount of income, but if he derived it from coupons on railway bonds, he was allowed to have only $975, unless he were regarded as "specially exempted." In such case, the corporation paying the tax is not liable.

Stockdale *vs.* Ins. Co., 20 Wall. 323.

But it is obvious, on the one hand, that one of the corporations included in the specification of those which are to pay tax on interest,

coupons, &c., cannot, when paying coupons, enquire into the amount of income of its several bondholders, and, on the other, that individuals with a total income of $1000, are not likely to bring suit against officers of Internal Revenue or against corporations, to recover $25, and these suggestions are made here to support the proposition that, where there is a doubt, this Court should be rather slow than swift to hold that the corporation in question is one of the enumerated corporations; because, where the income tax is collected from individuals directly, exact justice is done; where it is collected through the medium of corporations, injustice is done to the holders of their bonds whose total income does not exceed $1000.

FRANCIS W. PALFREY,

For the Eastern Kentucky Railway Company, Plaintiff in Error.

13 Exchange St., Boston, Mass.,
November 20, 1879.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE EASTERN KENTUCKY RAILWAY Company
vs.
CHARLES W. SLACK, COLLECTOR. } No. 122.

BRIEF FOR THE DEFENDANT IN ERROR.

As is said by the learned counsel for the plaintiffs in error, the questions in this case have been already debated in the brief in No. 123.

What seems proper to add is, that, inasmuch as it is from mere administrative convenience that certain companies were required to take the place of their creditors as tax-payers, it seems that wherever, by transfer, one of such companies came to occupy a position as to certain bond creditors that had previously been held by a company not required to become tax-payers, immediately the new machinery went into operation. The real tax debtor was considered not interested in the matter. The tax was, in either case, to come out of him in the end, and the manner in which it was to come was a mere formality, liable to change with a change in the class of persons who were substantially the debtors.